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NO. 401

In the Supreme Court of the United States

LEWIS C. DOUGALL,

Petitioner,

v.

SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY, a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioner prays that Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered June 13, 1958 by a two to one majority, affirming the United States District Court for the District of Oregon.

OPINIONS BELOW

Memorandum opinions of the District Court are not reported.

First opinion of the Court of Appeals is reported in 207 F 2d 843. The second opinion is not yet reported.

JURISDICTION

Jurisdiction of the Court is invoked under Title 28 Sec 1254, USC.

QUESTION PRESENTED

Where the Court segregated and tried one of two distinct and unrelated issues at the request of one party, but through inadvertence entered judgment dismissing the entire case without trying the reserved issue, does the Court have power to set aside the erroneous judgment and try the reserved issue?

For brevity we will refer to Lewis C. Dougall as petitioner, to Spokane, Portland and Seattle Railway Company as respondent, to Morrison-Knudson Co., Inc. as contractor, to the Federal Employers' Liability Act as FELA, and to the Federal Safety Appliance Act as SAA.

STATEMENT OF FACTS

Prior to January 30th, 1946, the date appellant was injured, the main line of respondent between Portland and Spokane was in need of repair. Respondent employed Morrison-Knudson Company, Inc., to clean its ditches, and to restore, recut and widen its banks (Ex. 14) (In. Tr. 5).

Petitioner was a member of the construction crew engaged in this work near Goodnoe, Washington and while so employed received severe injuries including the amputation of his left leg above the knee, four toes from his right foot, and many other injuries requiring extended hospitalization (In. Tr. 5-6)

The contractor used a motor truck and flat car, each with four wheels and flanges, to permit it to be operated on respondent's tracks. On the flat car was a standard ditcher, drag line, boom, cabledrum and other equipment. Power for pulling the flat car was supplied by the motor truck. The parties are agreed that neither truck nor car was equipped with any of the following safety appliances which are absolute requirements of the Safety Appliance Act: driving wheel brakes, train bra. system, automatic couplers, secure crab irons, hand holes on the ends of sides of the car, or sill steps (In. Tr. 6).

Petitioner's injuries occurred when he attempted to climb onto the flat car to convey instructions of the contractor's foreman to the operator of the drag line. Suddenly, without warning, the operator of the motor truck moved the truck and car with a sudden bump and jerk, throwing petitioner off the flat car onto the track. The coupling between the truck and flat car was not an automatic coupler, but a loose coupling which caused more slack than automatic couplers. There were no grab irons, hand holes, or sill steps.

The equipment was owned by contractor and though not equipped with safety appliances its use was permitted on the main line of respondent even though the entire crew was controlled in certain respects by a conductor and two brakemen of respondent (Ex. 13, pp. 25-27). The work was also supervised by respondent whose officials frequently visited the place where the repairs were being made and from time to time directed the crew where to load and unload the dirt (In. Tr. 79, Ex. 13, p. 31).

The original complaint was filed January 25, 1949 charging a violation of both Safety Appliance Act and Federal Employers' Liability Act (In. Tr. 33).

This case has been continuously predicated upon two basis FELA and SAA. Respondent asked that the FELA be segregated for its own convenience over petitioner's objection (In. Tr. 12). The Court granted this request and decided Dougall could not recover because he was not an employee within FELA. However instead of immediately trying the segregated issue the Court dismissed the entire case over petitioner's objections. Petitioner has continuously asked for a trial of this issue. This is seen by the following:

1. The original complaint was filed setting forth a cause of action under both FELA and SAA (2nd Tr. 1). The initial complaint sets forth violations of the SAA in five respects.

2. In the pre-trial order tendered by plaintiff's counsel six separate violations of the SAA are enumerated and it appears six times under issues of fact and six times under issues of law (2nd Tr. 31-40).

3. In the pre-trial order prepared by respondent and signed by Judge McCulloch on May 20, 1952 it is stated as follows:

> "Segregation of Issues.
>
> "Plaintiff's Contention: A. Plaintiff contends that all issues should be tried together and there should be no segregation issues for trial.
>
> "Defendant's Contention: B. Defendant contends that in order to avoid the expense and inconvenience of calling witnesses on all issues, some

of which may be rendered moot by reason of the Court's disposition of the legal issues, the Court should segregate for separate trial issue I A."

Issue I A was limited to the violation of the FELA. Issue I B, which was reserved, related to violations of the SAA, as well as certain phases of the FELA.

4. Judge McCulloch granted the request of appellee that the FELA be segregated for separate trial and at the hearing held the same day as the pre-trial order was signed the only evidence received related to violations of the FELA (In. Tr. 17, 18, 23, 24). Only one witness was called upon to testify and he was Edward Stanton, Vice-President of the defendant railway and his testimony was limited exclusively to the question of the application of the FELA to this set of facts. At that hearing one of the initial statements made by a counsel for appellant was:

> "Now, as I understand the case, your Honor, we are here to present to your Honor the first legal proposition which goes to the point as to whether or not the plaintiff here can maintain this action under the FELA, Sections 51 as amended by . . ."

5. In petitioner's trial brief offered at this hearing it was specifically stated that he was discussing only the "First legal proposition to be determined" This issue was the FELA.

6. Judge McCulloch in announcing his decision four days after this hearing stated that he was unable to distinguish this case from the case of Norman v. SP&S Railway which had been decided a short time before by another judge in the same district. The

Norman case was brought strictly under FELA and did not involve SAA. Norman was injured while repairing a bridge on the SP&S and while employed by an independent contractor. Part of the scaffolding gave way and he fell to the ground. There was no contention that SAA was violated (In. Tr. 16).

7. The findings of fact prepared by respondent and signed by the Court July 11, 1952 noted that the FELA had been "segregated for spearate trial" and that the parties had "rested on this issue" and that the Court had considered all matters under the provisions "of the FELA." (In. Tr. 17-18).

In the same findings of fact however, Judge McCulloch made the statement that the parties "had stipulated that this action is brought solely under FELA." (In. Tr. 23-24). From this respondent argues that plaintiff intentionally abandoned whatever rights he might have under SAA. The same findings recited that the two issues had been merely segregated. And in order to make his position crystal clear, petitioner filed formal objections the day before the findings were signed to the conclusion that the case came within the exclusive provisions of the FELA (In. Tr. 26).

8. In his initial brief in the Court of Appeals petitioner's counsel again stated "appellant's rights are determined in accordance with the provisions of FELA and the Federal Safety Appliance Act." (In. Tr. 58). He also called the Court's attention to admitted violations of the SAA on 26 occasions in his brief (In. Tr. 3, 4, 8, 45, 46, 47, 48, 50, 57, 58, 62, 63).

9. In a brief filed by respondent's counsel in the District Court recently it was conceded that the issue of the FELA was "segregated for separate trial and there was no occasion for the Court to consider the alleged violations of the SAA." (Defendant's reply memo Civil No. 8635 page 2.)

10. District Judge East also in connection with case No. 8635 (which was an independant action asking that the same issue be tried) also commented that "any theory of action the plaintiff might have had as a non-employee of the defendant was not adjudicated in said cause but, on the contrary reserved * * * ". (Memo November 1, 1956). He then suggested that the proper procedure was to reopen this case.

11. There is also an affidavit in the transcript concerning Watkins who represented petitioner until his death. He insisted he had never entertained the slightest intention of abandoning or waiving whatever rights his client might have had under the SAA (Tr. 28). As a matter of fact he stated this to present counsel at least 200 times.

On the initial appeal to the Court of Appeals the Court affirmed on the grounds that no recovery could be had under FELA since petitioner was not an employee of the railway. However the Court did not pass upon the SAA but noted:

> "There was reserved the issue as to whether the active or permissive use of equipment in violation of the Safety Appliance Act is negligence." 207 F 2d 843, 847.

Certiorari was denied by this Court, although apparently two judges wished to grant it 347 U.S. 904. Following the entry of mandate petitioner filed a motion in the District Court asking that the segregated untried issue of SAA be tried, but this request was denied by the District Court and this was affirmed by the Court of Appeals, 2-1.

SPECIFICATIONS OF ERROR TO BE URGED

The Court of Appeals erred in failing to set aside a judgment of the District Court which inadvertently dismissed the entire case even though one of the two basis for recovery had been reserved and untried.

REASONS WHY CERTIORARI SHOULD BE GRANTED

1. The Court of Appeals so far sanctioned such a departure from accepted and usual course of judicial proceedings and fair play by the District Court, as to call for an exercise of this Court's powers of supervision.

2. The Court of Appeals has decided an important question of Federal Law with respect to the scope of Rule 60 and the inherent powers of Federal Courts, which has not been, but should be, defined by this Court.

3. The decision is in conflict with the following decisions of this and other Federal Courts, to-wit:

A. U.S. v. Ohio Power Company, 77 S. Ct. 652, 1957.

B. Cahill v. New York, New Haven & Hartford R. Co., 351 U.S. 183, 76 S. Ct. 758, 100 L. Ed. 1075, 1956.

C. Klapprott v. U. S., 335 U.S. 601, 336 U.S. 942, 69 S. Ct. 384 1949.

D. Boudoin v. Lykes Brothers, S. S. Co., 350 U.S. 811, 76 S. Ct. 38, 100 Led 727.

E. Kenyon v. Chain O'Mines, CCA 10, 107 F2nd 160, 1939.

F. U.S. v. Karahaleas, CA 2, 205 F2d 331, 1953.

JURISDICTION OF THE LOWER COURT

Jurisdiction of the District Court was invoked under Federal Safety Appliance Act and FELA.

45 U.S.C. Sections 1-46; 45 U.S.C. Sections 51-55 (Tr. 3).

RULE INVOLVED

Rule 60, Federal Rules of Civil Procedure provides:

"(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the Court at any time of its own initiative or on the motion of any party and after such notice, if any, as the Court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate Court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

"(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the Court may relieve a party of his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been dis-

covered in time to move for a new trial under Rule 59 (b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action. As amended Dec. 29, 1948."

ARGUMENT

This is the clearest case of injustice. The original complaint was filed on two separate and distinct grounds, FELA and SAA.

Respondent, however, wished to avoid the expense and inconvenience of calling witnesses on all issues at that time (In. Tr. 13) and requested the Court to segregate for separate trial the violation of FELA. This the

Court did. At no time did petitioner waive the separate violation of SAA and indeed insisted that "all issues should be tried together and there should be no segregation of issues for trial." (In. Tr. 12).

In the dissenting opinion of Circuit Judge Pope, one of the two judges who heard both appeals, it is stated:

"Plainly this judge understood there were two claims, else why segregate one?

"The orderly thing would have been to decide that issue first as it was segregated, and later get around to consideration of the Safety Appliance issues. Apparently through oversight the conclusions and the judgment directed that the *action* be dismissed. If, as I think, it was fairly a two-claim action, the judgment should have been limited to dismissal of one claim only. Then Rule 54 (b) would have come into action.

"However, the judgment dismissed the action in its entirety. So framed it was appealable. Appellant specified as error: 'The U.S. District Court erred in entering its judgment order, to-wit: ADJUDGED that plaintiff take nothing by reason of this action, that this action be and the same is hereby dismissed.' And the point that there was involved a clear claim under the Safety Appliance Act, and that it was error to dismiss the action was argued in part IV of appellant's brief, quoting decisions that 'the law is clear that non-employees within the circle of risk are also covered by the Act.' This court understood this point was being made, but mistakenly said: 'Another theory of action he might have had as a non-employee may not be urged, here since it was not advanced in the trial court.' As I have shown, I think it was so advanced, though ineptly, but the ineptness did no harm since the trial court plaintly understood there were two claims for segregation.

"Appellant has both appealed from the denial

by the district court of relief under Rule 60, and has moved here for correction and amendment of our mandate.

"In my view the case within the rule applied in Cahill v. New York, N. H. and H. R. Co., 351 U.S. 183. As there, our original order was erroneous and we should 'recall it in the interest of fairness.'"

Continuously plaintiff has requested that the separate issue of SAA be tried. In the initial appeal to the Court of Appeals appellant's brief referred to a violation of the SAA 26 times (In. Br. 3, 4, 8, 45, 46, 47, 48, 50, 53, 58, 62, 63). Indeed it would have been absurd for plaintiff to abandon a separate and distinct basis for recovery. The SAA violation is evident and conceded. The pre-trial order stipulated that neither truck nor car were equipped with train brake system, automatic couplers, secure grab irons, hand holds, sill steps or train brakes (In. Tr. 6), all undeniable violations of the SAA (45 USC Sec. 1-46). There are innumerable decisions that violation of the SAA gives rise to absolute liability. Unlike FELA, it is unnecessary to prove negligence by the offending railway.

Petitioner failed with respect to FELA because the Court was not satisfied he was an employee of the railway. However, under SAA it is completely immaterial whether he was an employee of the railroad or an independent contractor. Shields v. Atlantic Coast Line R. Co., 350 U.S. 318, 76 S. Ct. 386, 1956.

It would have been absurd for counsel for petitioner to intentionally abandon one of the two basis for recovery. As a matter of fact late counsel for petitioner

assured present counsel at least 200 times that he had never abandoned any rights his client might have under SAA (2nd Tr. 28).

Two Circuit Judges felt that issue of the SAA had been discarded, because in the pre-trial order prepared by respondent, the issues were stated as follows:

"I. Alleged Liability under Federal Employers' Liability Act.

A. Right to Maintain Action under Federal Employers' Liability Act.

B. Alleged Liability for Negligence under Federal Employers' Liability Act and Alleged Violation of Safety Appliance Act.

1. If plaintiff has a right of action under the Federal Employers' Liability Act against defendant herein, is defendant liable under that Act (a) for negligence . . . or (b) in the active or permissive use of equipment in violation of the Safety Appliance Act . . . ?"

It is true, as dissenting Judge Pope states, that late counsel for petitioner was probably inept in signing respondent's trial order which listed SAA as a sub-issue under FELA. Nevertheless he felt he had made his position clear by the balance of the same pre-trial order. Specifically the following:

(a) Paragraph VII states the parties agree the equipment was not provided with six mandatory requirements of SAA (1st Tr. 6).

If this issue was no longer of importance why set it forth in such detail?

(b) It was also stated that plaintiff contended that

defendant was negligent in using equipment not equipped with 6 enumerated requirements of SAA (1st Tr. 9).

(c) As defendant's contention it was stated that the SAA did not apply to this equipment and it was not a cause of this accident (1st Tr. 9).

(d) Even stronger is this (1st Tr. 12).

"Segregation of Issues. Plaintiff's Contention.

"A. Plaintiff contends that all issues should be tried together and there should be no segregation for issues for trial.

"Defendant's Contention: B. Defendant contends that in order to avoid the expense and inconvenience of calling witnesses on all issues, some of which may be rendered moot by reason of the Court's disposition of the legal issues, the Court should segregate for separate trial issues I A."

It was strictly at respondent's request that the two issues were segregated. Respondent in asking for a segregation stated that "some" of the issues may be rendered "moot."

He did not say all issues would be rendered moot but only some would be. The two issues were segregated because respondent's counsel requested it. The confusion stems directly from that fact. Will the Court permit respondent to profit by the confusion which it interjected?

The pre-trial order quoted above was drafted by respondent. In the pre-trial order offered by petitioner it was stated (2d Tr. 30):

"This action is brought under the provisions of

the Federal Employers' Liability Act, Title 45, USCA Ch. 2, Section 51 and following, *and* the provisions of the Federal Safety Appliance Act, Title 45, U.S.C.A., Chapter 1, Section 1, and following:"

6 separate violations of SAA were then enumerated (2d Tr. 31):

"5 issues of fact appear:

(1) Violation of FELA.

(2) Violation of SAA.

(3) Proximate cause under FELA and SAA.

(4) Contributory negligence.

(5) Injuries (2d Tr. 33).

SAA and FELA were also stated as separate, independent, and distinct modes of recovery under proposed issues of law (2d Tr. 37) and contentions (2d Tr. 38).

This proposed pre-trial order was served a few days prior to the signing of the pre-trial order drafted by respondent.

In the initial brief filed with the Court of Appeals petitioner asserted violations of SAA on 26 occasions (1st Tr. 3, 4, 8, 45, 46, 47, 48, 50, 57, 58, 62, 63). As a matter of fact the text of § 1, 2, 4, 9 and 11 of SAA are set forth in haec verba (62). Among other statements in this brief are the following:

(a) "There was no question of the violation of the Safety Appliance Act * * * " (45).

(b) "FELA and Safety Appliance Act were violated * * * " (46).

(c) "Federal Employers' Liability Act and Safe-

ty Appliance Act were both violated and resulted in appellant's injuries" (46).

(d) "A violation of the Federal Safety Appliance Act constitutes negligence per se * * * " (46).

(e) "Notwithstanding the language as to negligence is Sec. 1 of the FELA it is now settled that the duty imposed upon the carrier by the Safety Appliance Act is not based on Negligence, but is an absolute duty * * * " (47).

What possible construction can be placed upon these statements other than a continuous assertion that he was entitled to recover under both SAA and FELA? As a matter of fact this is specifically stated: (Br. 46).

Respondent was also well aware that petitioner was arguing strenuously that SAA had been violated. For example on page 31 of respondent's initial brief in the Court of Appeals it is stated:

"Appellant advances the argument in this Court * * * that, conceding he is not an 'employe' of appellee within the meaning of Section 1 of the FELA (45 U.S.C.A. Section 51); he was within the coverage of the Federal Safety Appliance Acts (45 U.S.C.A. Section 1 et seq.); and, therefore, his action should have not been dismissed.

"Appellant first baldly states that there was no question as to appellee's violation of the Safety Appliance Acts * * * ."

The Court of Appeals noted in its initial opinion that:

"There was reserved the issue as to whether the active or permissive use of equipment in violation of the Safety Appliance Act was an act of negligence." 207 F 2d 843, 847.

Even respondent concedes that FELA was segregated for separate trial and there was no occasion for the Court to consider violations of SAA (2d. Br. 8).

The basic question in this proceeding is whether a separate grounds for recovery under the SAA was abandoned or reserved and segregated. The entire record reveals continuous assertions that there are two grounds for recovery. There was never the slightest intention to discard one. Indeed it would be hard to imagine why venerable counsel such as Mr. Watkins would suddenly do a complete reversal and discard an issue which he had been so careful to inject. His subsequent conduct speaks louder than words. He advanced it in the Court of Appeals, he formally objected in the District Court, he joined with the present counsel in filing an independent action asking that this untried issue be heard, and one of his last acts before his death was to assist present counsel in preparing the motion which is the subject matter of this appeal. If Mr. Watkins was inept in not making the record more forceful then we respectfully urge your Honors to exercise the ample powers with which you are invested to see that substantial justice is accomplished. The important consideration in the long run is how it affects the interest of litigants. If Mr. Watkins did make such a mistake then justice should resolve any doubts in favor of the parties. Neither should not be bound strictly by oversights of their respective attorneys.

Rule 60 invests ample power to rectify this obvious miscarriage. It has been the universal practice to give Rule 60 A a broad and liberal construction.

Klapprott v. U.S., 335 U.S. 601, 336 U.S. 942, 69 S. Ct. 384, 1949;

Professor Moore believes the rule should be liberally construed for the purpose of doing substantial justice, and suggests the following tests:

> "If relief is sought from a default judgment or a judgment of dismissal where there has been no consideration of the merits, whether in a particular case the interest of deciding cases on the merits outweighs the interest in orderly procedure and in the finality of judgment, and whether there is merit in the defense or claim, as the case may be; if relief is sought from a judgment rendered after a trial on the merits, whether movant had a fair opportunity to present his claim or defense; whether there are any intervening equities which makes it inequitable to grant relief; and any other factor that is relevant to the justice of the judgment under attach. * * *." Vol. 7, Sec. 60.19, p. 225.

In this case there are no intervening rights which will be infringed. Petitioner has been denied a hearing with respect to SAA despite 6 admitted SAA violations. Respondent in preparing the judgment was responsible for this oversight and would suffer no conceivable prejudice because the matter has not been presented at an earlier date. All essential facts proving conclusively that a violation of the Safety Appliance Act has occurred were stipulated previously in the pre-trial order. None of those stipulated facts, which are the heart of this case, have been changed or altered in any respect.

This court has the power to correct this obvious oversight. Relief has often been granted in analogous situations.

Greenberg v. Arsenal Bldg. Corp., CCA 2, 144 F2d 292, 1940.
U. S. v. Roth, CCA 2, 164 F2d 575, 1948.
Crosby v. Pacific SS Lines, CCA 9, 133 F2d 470, 1943, cert. den. 319 U.S. 752, 63 S. Ct. 1166.
Woodworkers Tool Works v. Byrne, CA 9, 191 F2d 667, 1951.
Libby, McNeil & Libby v. Alaska Industrial Board, DC Alaska, 109 FS 101, 1952.
Ex Parte Wright, DC Cal., 8 FRD 358, 1948.
Bowles v. Branick, DC MO, 66FS 557, 1946.

These cases are ample proof that a court is not helpless when confronted with an oversight so manifest and so shocking. Professor Moore in his work on Federal Practice, 2nd Ed., Vol 6 in discussing Rule 60A (Lc 4031), states:

"All elements of society—the courts, the profession, litigants, and the public at large—have an interest in the stability of judgments. They also have an interest in seeing that judgments are clerically accurate, effect substantial justice, and do not become instruments of oppression and fraud.

(Lc 4042) "The error envisioned by Rule 60 (a) cover such things as mispirsons, oversights and omissions, unintended acts or failures to act. Rule 60 (a) is a substantial adoption of the principles embodied in Equity Rule 72. In the interest of justice and to the end that the record reflect the actual intention of the court and parties relief from such minor errors should be freely granted."

(Lc 4044) "Where the court errs in its mathematical computations as to the amount due the plaintiff, then relief can be had under the provisions of Rule 60 (a). Similarly, relief can be given from a mistake in the record made by the clerk. Where through the error and confusion of a naturalization applicant, and through the failure of the

> clerk to ascertain the true intention of the applicant as to the name under which he desired to receive his citizenship, the court under Rule 60 (a) may correct the error."

This particular situation was either caused by a clerical error within the meaning of 60 (a) or it was as mistake within the meaning of 60 (b) (6).

Professor Moore, in speaking of Rule 60 (b) (6), states (Federal Practice, 2d Ed., Sec. 60.27, Vol. 7, p. 309):

> Speaking generally, clause (6) is a reservoir of equitable power to do justice in a particular cause for any reason not comprehended in the preceding clause (1)-(5), that justifies relief."

This case is very similar to Kenyon v. Chain O'Mines, CCA 10, 107 Fed. 2d 160, 1939, where the court stated a judgment may be amended to make it conform to findings where by mistake or inadvertence a judgment has been entered in terms differing therefrom.

Even aside from Rule 60 and the provisions dealing with interlocutory orders, it has always been recognized that the court has inherent power to entertain remedial actions for relief against judgments in order to see that substantial justice is accomplished.

> Oliver v. City of Shattuck, CCA 10, 157 F2d 150, 152, 1946;
> Barron & Holtzoff, Federal Procedure, Vol. 3, § 1331, P. 272.

This is also illustrated by Cahill v. New York, New Haven and Hartford R. Co., 351 U.S. 183, 76 S. Ct. 758, 1956. This action was filed under FELA. Judgment was entered in the District Court for plaintiff

for $90,000.00. The Court of Appeals reversed on the ground that evidence was insufficient to support a finding that the railroad had been negligent in failing to provide a safe place to work. The accident occurred on Highway 1 in New Haven, Conn. Upon appeal the U.S. Supreme Court reversed and reinstated the verdict. The court also denied a rehearing. Subsequently the railroad paid $90,000.00 to plaintiff. After plaintiff had spent most of it the railroad asked the Supreme Court to recall its mandate because it had overlooked the possibility that the lower court might have erred in admitting evidence concerning other accidents at this same location. This was granted and the case remanded. If this remedy is available to the railroad it is certainly available to injured employees.

To the same effect is U. S. v. Ohio Power Company, 353 U.S. 98, 77 S. Ct. 652, 1 L. Ed. 683, 1957. This was a tax case involving the right of the War Production Board to certify that only part of the actual cost of wartime facilities, constructed by a taxpayer at the instance of the government, was necessary in the National Defense and hence subject to accelerated amortization under the Internal Revenue Code. Claiming that the WPB had no power to certify less than the full cost, the taxpayer sued in the Court of Claims to recover the alleged overpayments. The Court of Claims sustained this contention on March 1, 1955. The Government petitioned for certiorari. This was denied October 17, 1955. Petition for rehearing was denied December 5, 1955. Finally on June 11, 1956, the Supreme Court sua sponte vacated its order of December 5, 1955, and vacated its order denying certiorari,

and reversed the judgment of the Court of Claims. The Supreme Court felt it should be disposed of consistently with two other cases which it had decided in the interim. The court stated (l.c. 652):

> "We have consistently ruled that the interest in finality of litigation must yield where the interest of justice would make unfair the strict application of our rules. This policy finds expression in the manner in which we have exercised our power over our own judgments, both in civil and criminal cases. Clark v. Manufacturers Trust Co., 337 U.S. 953, 69 S. Ct. 1525, 93 L. Ed. 1754; Goldbaum v. United States, 347 U.S. 1007, 74 S. Ct. 861, 98 L. Ed. 1132; Banks v. United States, 347 U.S. 1007, 74 S. Ct. 861, 98 L. Ed. 1132; McFee v. United States, 347 U.S. 1007, 74 S. Ct. 861, 98 L. Ed. 1132; Remmer v. United States, 348 U.S. 904, 75 S. Ct. 288, 99 L. Ed. 710; State of Florida ex rel Hawkins v. Board of Control, 350 U.S. 413, 76 S. Ct. 464, 100 L. Ed. 486; Boudoin v. Lykes Bros. S.S. Co., 350 U.S. 811, 76 S. Ct. 38, 100 L. Ed. 727; Cahill v. New York, N. H. & H. R. Co., 351 U.S. 183, 76 S. Ct. 758, 100 L. Ed. 1075; Achilli v. United States, 77 S. Ct. 669."

We respectfully urge this court to rectify a situation so patently unjust. This court, and only this court, has the power to bring about substantial justice. An employe has been horribly mangled because of an admitted criminal act on the part of the railway in permitting equipment to be operated on its right of way in direct violation of the SAA. There is no question as to injury (amputation of one leg and four toes on his other foot). There is also little question with respect to liability. Indeed this is virtually stipulated in the pre-trial order which admitted 6 violations of SAA. But he has been denied any relief whatsoever, except for a small preliminary initial allowance from the Washington Work-

men's Compensation Fund. And even these benefits were soon terminated by the commission, which informed him that he should pursue his remedy strictly against the railway, and directed him to repay whatever benefits he had received. He was advised by counsel that he had a clear cut cause of action against the railway. Relying upon this he filed an election to pursue his remedy strictly under the railway acts. His complaint charged a violation of FELA and SAA. At the request of appellee the issue of the violation of the FELA was segregated for separate hearing. The lower court concluded that since he was not a direct employe of the railroad, itself a very difficult question, he could not recover under FELA. However, instead of immediately trying the segregated reserved issue the court entered judgment against him over petitioner's objection, as if the entire case had been heard. The end result was that the court has turned its back on a man who has been made a cripple for life in a case of absolute liability. This cannot and must not be the law! In fairness, Lewis Dougall must be given his day in court.

It is respectfully submitted that the decision below is incorrect and in conflict with the decisions of this Court and several Courts of Appeals and should be corrected, and that this petition for writ of certiorari should therefore be granted.

Respectfully submitted,

LEWIS C. DOUGALL, pro se,
ROGER TILBURY,
Of Counsel for petitioner,
Lewis C. Dougall.

APPENDIX I

Opinion of the District Court

ORDER DENYING PLAINTIFF'S MOTION FOR CORRECTION AND RELIEF FROM JUDGMENT

The plaintiff having moved the court under Rule 60 of the Federal Rules of Civil Procedure for correction of and relief from the judgment heretofore entered on July 11, 1952, and said motion having come on to be heard before the court, Roger G. Tilbury, attorney for plaintiff, appearing in support of the motion, and Cleveland C. Cory, of attorneys for defendant, appearing in opposition thereto, and the court having heard arguments of counsel and having considered the written briefs of counsel filed at the time of argument, and the court having fully considered the entire record in this case and the proceedings in the United States Court of Appeals for the Ninth Circuit herein, and the court being of the opinion that plaintiff's motion should be denied, it is

Ordered that plaintiff's motion for correction and relief from judgment be, and the same hereby is, denied in all respects.

Done and dated this 15th day of January, 1957.

s/ WILLIAM G. EAST,
United States District Judge.

APPENDIX II

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LEWIS C. DOUGALL, *Appellant*,	)	
vs.	)	No. 15,554
SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY, a corporation, *Appellee*.	)	June 13, 1958

Appeal from the United States District Court for the District of Oregon

BEFORE: HEALY, POPE, and HAMLEY, Circuit Judges

HEALY, Circuit Judge

This is an appeal from an order of the United States District Court for Oregon denying appellant's motion, under Rule 60 of the Federal Rules of Civil Procedure, for correction and relief from a judgment which was entered July 11, 1952.[1]

This judgment dismissed appellant's action under the Federal Employers' Liability Act to recover from appellee damages on account of personal injuries sustained by appellant in January of 1946. The judgment was affirmed on appeal to this court (207 F 2d 843,

[1] Appellant has also filed with this court a motion for correction and amendment of our mandate in the previous appeal of this case, premised on the assertion that we there lacked jurisdiction because there was no final judgment from which to appeal. The motion is denied for reasons hereinafter appearing.

Case No. 13,492), and certiorari was denied (347 U.S. 904). Judgment on this court's mandate was entered below February 23, 1954. The motion under Rule 60, Federal Rules of Civil Procedure, was filed November 21, 1956, and the order presently appealed from was entered in January 1957.

As stated in our opinion on the original appeal, a pre-trial order, approved by counsel for both parties, was entered. By stipulation, the order was to supersede all pleadings. The final pre-trial order set out the issues as follows:

"I. Alleged Liability under Federal Employers' Liability Act

A. Right to Maintain Action under Federal Employers' Liability Act.

B. Alleged Liability for Negligence under Federal Employers' Liability Act and Alleged Violation of Safety Appliance Act.

1. *If plaintiff has a right of action under the Federal Employers' Liability Act against defendant herein,* is defendant liable under that Act (a) for negligence . . . or (b) in the active or permissive use of equipment in violation of the Safety Appliance Act . . ." [Emphasis supplied.]

It is clear that the action to be tried was framed entirely under the Federal Employers' Liability Act. The trial court agreed to separate issues IA and IB. Witnesses were heard as regards the first of these issues, namely IA, "is there a right of action under FELA?" The trial court found the defandant railroad company NOT liable under the Federal Employers' Liability Act, on the ground that Morrison-Knudsen was an inde-

pendent contractor; therefore, plaintiff was not an employee of the defendant railroad company. This being the case, the court did not reach issue IB, but in accord with its findings of fact it entered judgment dismissing the action.[2]

The district court's order denying appellant's motion for relief must be affirmed. For the purpose of the motion, this court will look at the record in No. 13,492 solely for the purpose of determining whether the judgment of July 11, 1952, was a final judgment, or whether, as appellant contends, it was an unappealable interlocutory order. The judgment dismissed and terminated this action in the court below. It was, as already indicated, granted on findings of fact and conclusions of law which determined that appellant was not an employee of appellee and could not maintain an action under the Federal Employers' Liability Act.

The judgment being one of dismissal on the merits of appellant's action for damages under the provisions of the Federal Employers' Liability Act was obviously a final and appealable judgment.

Affirmed.

POPE, C. J.

I dissent. I think the part of the pre-trial Order des-

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[2] The court also suggested from the bench that the plaintiff might desire to amend the pre-trial order or commence a new action on the ground that there was liability independent of the FELA for permitting violations of the Safety Appliance Act. Plaintiff did not take advantage of the suggestion.

ignated under heading "I B., although poorly drawn,[1] did raise the question whether there was liability under the Safety Appliance Act. If there was any ambiguity about it, the Judge understood it to mean what I have indicated, for his findings recite, in the second introductory paragraph, that "the issues of plaintiff's right to maintain this action under the provisions of the Federal Employers' Liability Act was segregated for separate trial by the Court. . . ." Plainly this Judge understood there were two claims, else why segregate one?

The orderly thing would have been to decide that issue first as it was segregated, and later get around to consideration of the Safety Appliance Act issues. Apparently through oversight the conclusions and the judgment directed that the *action* be dismissed. If, as I think, it was fairly a two-claim action, the judgment should have been limited to dismissal of one claim only. Then Rule 54(b) would have come into action.

However, the judgment dismissed the action in its entirety. So framed it was appealable. Appellant specified as error: "The U. S. District Court erred in entering its judgment order, to-wit: 'ADJUDGED that plaintiff

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[1] The paragraph read in full as follows: "1. If plaintiff has a right of action under the Federal Employers' Liability Act against defendant herein, is defendant liable under that Act (a) for negligence in the operation of the facilities used to repair and recondition the roadbed and right of way in question, or (b) in the active or permissive use of equipment in violation of the Safety Appliance Act; and (c) was defendant's alleged conduct a cause, in whole or in part, of plaintiff's damages?"

The trouble arises from the use of the "if" clause with which the statement begins. I think it possible to construe the clause as applying only to (a), and not to (b), particularly in view of the trial court's plain understanding.

take nothing by reason of this action, that this action be and the same is hereby dismissed." And the point that there was involved a clear claim under the Safety Appliance Act, and that it was error to dismiss the action was argued in part IV of appellant's brief, quoting decisions that "the law is clear that non-employees within the circle of risk are also covered by the Act." This court understood this point was being made, but mistakenly said: "Another theory of action he might have had as a non-employee may not be urged here since it was not advanced in the trial court." As I have shown, I think it was so advanced, though ineptly, but the ineptness did no harm since the trial court plainly understood there were two claims for segregation.

Appellant has both appealed from the denial by the district court of relief under Rule 60, and has moved here for correction and amendment of our mandate.

In my view the case comes within the rule applied in Cahill v. New York N.H. and H.R. Co., 351 U.S. 183. As there, our original order was erroneous and we should "recall it in the interest of fairness."

(Endorsed:) Opinion and Dissenting Opinion. Filed June 13, 1958.

Paul P. O'Brien, Clerk.

FILE COPY

SEP 27 1958
JAMES R. BROWNING, Clerk

In the Supreme Court
of the United States

OCTOBER TERM, 1958

No. 400

LEWIS C. DOUGALL,
Petitioner,

v.

SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY, a corporation,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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In the Supreme Court
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OCTOBER TERM, 1958

No.

LEWIS C. DOUGALL,

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SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY, a corporation,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The memorandum opinions of the Oregon district court on the first appeal are not reported, but are found in the transcript of record (No. 13492, pp. 16-17). The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 207 F.2d 843, and this Court's denial on February 1, 1954 of petitioner's application for a writ of certiorari is reported at 347 U.S. 904, 74 S. Ct. 429, 98 L. Ed. 1063.

The district court's order of January 15, 1957, denying petitioner's motion for relief under Rule 60 of the Federal Rules of Civil Procedure is found in the transcript of record (No. 15544, pp. 16-17). The opinion of the Court of Appeals, dated June 13, 1958, affirming this order and also denying petitioner's motion in that court for correction and amendment of the court's mandate on the previous appeal is reported at 256 F.2d 601. On August 5, 1958, the Court of Appeals denied petitioner's motion for a rehearing (No. 15544, p. 57).

QUESTION PRESENTED

Did the district court and the court of appeals err in denying petitioner's motion filed in November 1956 to set aside a final judgment entered in July 1952 upon findings of fact and conclusions of law, where the judgment had been affirmed by the court of appeals whose mandate did not authorize further proceedings?

STATEMENT OF THE CASE

The complaint herein was filed in the Oregon federal court on January 25, 1949. Therein petitioner sought to recover the sum of $200,000 general damages and $144,826.70 special damages on account of serious personal injuries he allegedly sustained while he was working on respondent's railroad right of way near Goodnough, Washington, on January 30, 1946. Liability was predicated upon various allegations of common-law negligence, as well as claimed violations of several provisions of the Federal Safety Appliance Acts (No. 15544, T.

3-7). The complaint stated that petitioner ". . . brings this action against the defendant under the Federal Employers' Liability Act and the Federal Safety Appliance Act" (No. 15544, Tr. 3). It was further alleged that at the time of injury "plaintiff was in the employ of Railway Company in interstate commerce" (No. 15544, Tr. 4).

While the action was commenced a few days prior to the expiration of the three-year statute of limitations contained in the Federal Employers' Liability Act, it was brought nearly a year after the expiration of the two-year Oregon statute (O.R.S. 12.110 (1)) governing an action for an injury to the person or rights of another, not arising on contract.

The record conclusively shows that at the time of pretrial in the spring of 1952 the late Mr. Elton Watkins, who was petitioner's attorney from 1947 until his death in 1956, made a deliberate tactical decision to stake his entire case upon the contention that petitioner was an employee of respondent and was therefore entitled to the protection of the Federal Employers' Liability Act, and not to rely upon any theory which petitioner might have had as a nonemployee of the respondent.

In a proposed pretrial order drafted by Mr. Watkins and served on counsel for respondent on April 17, 1952, (No. 15544, Tr. 29-43) one of petitioner's contentions under "Issues of Law" was that he would be entitled to recover ". . . whether plaintiff was an employee of defendant, or an employee of Morrison-Knudsen, Inc.,

or an invitee of defendant, or as a member of the public" (No. 15544, Tr. 39).

However, this ground of recovery was abandoned by Mr. Watkins in the final pretrial order which was agreed upon by counsel after a number of conferences prior to trial in May, 1952 (No. 13492, Tr. 3-13). It was therein provided that jurisdiction of the court was "claimed by plaintiff under and by virtue of the provisions of the Federal Employers' Liability Act, as amended" (Par. III). There were only two issues set up by the parties under "ISSUES OF FACT AND LAW." The first issue was entitled "I Alleged Liability Under Federal Employers' Liability Act." There were only two subdivisions under this issue: "(A) Right to Maintain Action Under Federal Employers' Liability Act" and "(B) Alleged Liability for Negligence Under Federal Employers' Liability Act and Alleged Violation of Safety Appliance Act." Under subdivision (B) the two issues were prefaced as follows: "1. If plaintiff has a right of action under the Federal Employers' Liability Act . . . " and "2. If plaintiff may maintain this action under the Federal Employers' Liability Act . . . " Under the second issue entitled "Damages" it was stated: "1. If plaintiff may maintain this action under the Federal Employers' Liability Act . . . " (No. 13492, Tr. 7-10). Pursuant to the written stipulation of the attorneys, the pretrial order superseded all pleadings (No. 13492, Tr. 13).

Issue I(A) relating to whether or not petitioner was an employee of respondent so as to be under the Federal Employers' Liability Act was segregated for separate

trial before the court on May 20, 1952, since petitioner had failed to file a timely demand for trial by jury. Following the trial, arguments and submission of briefs, the district court held that petitioner was not an employee of respondent but was employed by its contractor, Morrison-Knudsen, Inc. In its opinion the court stated (No. 13492, Tr. 16):

> "I should think that this proceeding might by amendment be converted into a third party proceeding—if plaintiff so desired—but of course both sides would be entitled to be heard as to this."

Petitioner's former counsel did not adopt the court's pointed suggestion to move for an amendment of the pretrial order and convert this action into a third-party proceeding on the theory that petitioner was an employee of Morrison-Knudsen, Inc., rather than of respondent. Instead he filed a motion for rehearing. On June 9, 1952, the record was reopened and petitioner was allowed to introduce additional testimony. The court thereafter, filed its memorandum on the petition for rehearing, determining adversely to petitioner the two controverted issues set up in the pretrial order under Issue I(A) (No. 13492, Tr. 17).

On July 11, 1952, the court entered findings of fact and conclusions of law which in substance determined that at the time of the accident petitioner was an employee of Morrison-Knudsen, Inc., and that he was not entitled to maintain the action under the Federal Employers' Liability Act (No. 13492, Tr. 17-24). Paragraph XVI of the findings of fact stated:

"The parties have stipulated and the Court finds

> that this action is brought solely under the provisions of the Federal Employers' Liability Act, and plaintiff's right to maintain this action is limited by and is to be determined solely in accordance with the provisions of the Federal Employers' Liability Act."

Prior to the date on which the findings and conclusions and the judgment of dismissal were entered, Mr. Watkins filed elaborate exceptions to the proposed findings of fact and conclusions of law. However, he did not object to proposed finding XVI (No. 13492, Tr. 25-27).

Petitioner appealed to the United States Court of Appeals for the Ninth Circuit which affirmed the judgment of dismissal on the ground that the trial court's finding that petitioner was not an employee of respondent was "amply supported in the evidence" (207 F.2d 843, 847). The court further stated (ibid):

> "Appellant discusses in his brief the absolute duty imposed by the Safety Appliance Act and contends that the equipment which caused his injuries was used in violation of the provisions of that Act. The pre-trial order limits and ties his cause of action to the provisions of FELA. Incidentally, there was reserved the issue as to whether 'the active or permissive use of equipment in violation of the Safety Appliance Act' was an act of negligence. True the two statutes are in pari materia and a violation of the Safety Appliance Act is negligence. San Antonio etc Ry. Co. v. Wagner, 241 U.S. 476, 484. But an action brought under FELA is an action under federal law and is confined to the relationship of employer and employee. It follows that violation of the Safety Appliance Act is of no moment in determining Spokane's liability under FELA if 'employment' of appellant by Spokane is not shown. Another theory of action he might

have had as a non-employee may not be urged here since it was not advanced in the trial court. Fowler v. Crown-Zellerbach Corporation, 9 Cir. 163 F.2d 773, 774."

Petitioner then filed a petition for a writ of certiorari in this Court (October Term 1953, No. 508). The petition itself was twenty-nine pages in length and a reply brief of fourteen pages was also filed. It is of the utmost significance that in neither of these documents is any mention made of respondent's alleged liability to petitioner under the Federal Safety Appliance Act. The petition for a writ of certiorari was denied on February 1, 1954 (347 U.S. 904, 74 S. Ct. 429, 98 L. Ed. 1063), thus leaving unimpaired as the law of this case the ruling that petitioner was not respondent's employee so as to be under Federal Employers' Liability Act.

The mandate of the Court of Appeals which did not grant the trial court permission to take further proceedings in this case was entered in the district court on February 23, 1954 (No. 15544, Tr. 15-18).

It was not until November 21, 1956, nearly thirty-three months later, that petitioner filed his motion under Rule 60 of the Federal Rules of Civil Procedure for correction and relief from the judgment of July 11, 1952 (No. 15544, Tr. 18-22). Neither in the motion itself, nor in the record before the court, did petitioner offer any excuse or explanation for the long delay.

On January 15, 1957 the trial court denied petitioner's motion and a second appeal was taken to the Court of Appeals. Petitioner then filed in the Court of

Appeals a motion for correction and amendment of its mandate in the previous appeal. On June 13, 1958 the appellate court affirmed the order appealed from and also denied the motion for correction and amendment of its mandate. Finally, on August 5, 1958, the court below denied petitioner's motion for a rehearing.

Petitioner merely seeks a review by this Court of the district court's order denying his Rule 60 motion. No attempt has been made to bring before this Court the denial by the Court of Appeals of petitioner's motion for correction and amendment of its February 1954 mandate.

The entire record clearly demonstrates a deliberate and calculated choice upon the part of petitioner through his attorney, the late Mr. Watkins, in the spring of 1952, to stake his recovery entirely upon the proposition that he was employed by defendant and therefore entitled to the benefits of Federal Employers' Liability Act. Although he was given many opportunities thereafter to reassert another theory of recovery based upon the inconsistent theory that petitioner was an employee of Morrison-Knudsen, Inc., Mr. Watkins decided to concentrate on respondent's alleged liability to petitioner under the Federal Employers' Liability Act, and he battled his client's cause all the way to this Court.

The present proceedings under Rule 60 were initiated by petitioner's new counsel who believes that Mr. Watkins' tactical decision was ill-advised.

ARGUMENT

I. The district court lacked jurisdiction to grant petitioner relief under Rule 60 by way of correction or relief from a judgment which had been affirmed by the Court of Appeals in the absence of permission by that court.

The foregoing review of the record is probably unnecessary in view of the terms of the mandate of the Court of Appeals which was entered in the district court on February 23, 1954. Thereunder, the district court had no discretion to disturb the judgment of dismissal which had been affirmed. Furthermore, the Court of Appeals in June 1958 denied petitioner's motion for correction and amendment of its previous mandate. Since the Court of Appeals had not given the district court permission to deviate from its mandate, it follows that the district court below lacked the power to grant petitioner relief under Rule 60(b).

The leading case so holding is *Home Indemnity Co. v. O'Brien*, 112 F.2d 387 (C.A. 6). The O'Brien case was followed by the Court of Appeals for the Third Circuit in *Butcher & Sherrerd v. Welsh*, 206 F.2d 259, cert. den. 346 U.S. 925, 74 S. Ct. 312, 98 L. Ed. 418, rehearing den. 347 U.S. 924, 74 S. Ct. 513, 98 L. Ed. 1089, rehearing den. 347 U.S. 940, 74 S. Ct. 626, 98 L. Ed. 1089, rehearing den. 348 U.S. 939, 75 S. Ct. 354, 99 L. Ed. 736, where the court issued a writ of mandamus enjoining the district court from setting aside a judgment which had been affirmed. In that case, permission to apply for such relief had not been obtained from the appellate court and was not given by the mandate. The court rejected the argument that Rule 60(b) gave the district court

power to grant relief from such a judgment without the prior approval of the appellate court. The *Welsh* decision was followed by the same court in *Ginsburg v. Stern*, 242 F.2d 379.

II. Since the judgment of dismissal was entered in accordance with findings of fact and conclusions of law, the district court lacked jurisdiction to grant petitioner relief under Rule 60(a) on account of a clerical mistake, or an error arising from oversight or omission.

The record in this case clearly shows that there was no "clerical mistake" or "error or omission" in connection with the entry of the judgment of July 11, 1952. However, assuming only for purposes of argument that there was some mistake or inadvertence, the district court had no power to correct it under Rule 60(a). Of course, since Rule 60(a) carries no time limitation, and permission from the Court of Appeals to correct merely a clerical error probably would be unnecessary, the petition cites many cases decided under Rule 60(a) (Pet. p. 19). However, they all involve minor typographical or pure clerical errors or omissions, not of a substantive nature.

On the other hand, the various Courts of Appeal have uniformly held that where a judgment is entered in accordance with findings of fact and conclusions of law, as was the judgment of July 11, 1952, an omission or even a serious error therein, does not constitute an error which can be corrected under Rule 60(a) [*Gray v. Dukedom Bank*, 216 F.2d 109 (C.A. 6); *West Virginia Oil & Gas Co. v. George E. Breece Lbr. Co.*, 213 F.2d 702 (C.A. 5); *Ferraro v. Arthur M. Rosenberg Co.*,

156 F.2d 212 (C.A. 2); Cf. *Hirsch v. United States of America*, 186 F.2d 524 (C.A. 6)].

III. Since the motion for correction and relief from the July 1952 judgment was not filed until November 1956, the district court lacked jurisdiction of the motion, even if there had been a satisfactory showing of mistake, inadvertence, surprise, excusable neglect, fraud, misrepresentation, or some other misconduct.

Petitioner takes the alternative view (Pet. p. 20) that "this particular situation was either caused by a clerical error within the meaning of 60(a) or it was a mistake within the meaning of 60(b)(6)." We have shown that there was no clerical error in connection with the entry of the 1952 judgment. It is equally clear that the district court lacked jurisdiction to consider the motion under Rule 60(b)(6).

Even if it be assumed solely for purposes of argument that the record showed valid grounds for relief from the judgment on account of mistake, inadvertence, surprise, excusable neglect, fraud, misrepresentation, or misconduct of an adverse party, petitioner was barred from relief under Rule 60(b)(1) and (3) since a motion for relief on these grounds must be filed not more than one year after entry of judgment.

Rule 60(b)(6) can only be invoked under the most extraordinary circumstances, and for reasons other than would justify relief under any one of the first five subdivisions of Rule 60(b). Therefore, when a motion purportedly made under Rule 60(b)(6) is, in substance, founded upon grounds included in subdivisions (1), (2) or (3) of Rule 60(b), it is barred by the one-year

limitation applicable thereto. This rule has been followed by the Court of Appeals for the Ninth Circuit in *City and County of Honolulu v. United States of America*, 224 F.2d 573; and see 7 Moore's Federal Practice (2d Ed.), § 60.27, pp. 293-298.

IV. Even if grounds for relief under Rule 60(b)(6) had been shown, the motion was not made "within a reasonable time," in the absence of any explanation for the delay.

Petitioner's motion was filed over four years after the entry of judgment, and thirty-three months after the entry of the mandate of the Court of Appeals on the previous appeal. Petitioner has never offered any explanation whatsoever for this long delay. Therefore, assuming only for purposes of argument that petitioner could bring himself under Rule 60(b)(6), the motion was not made "within a reasonable time" and was correctly denied by the courts below on that ground alone.

In a number of cases, the courts of appeal have held that motions under Rule 60(b)(6) were not made "within a reasonable time" where periods of from fourteen to twenty-four months elapsed between the entry of judgment and the motion for relief under Rule 60(b). *Gilmore v. Hinman*, 191 F.2d 652 (C.A.D.C.) (sixteen months); *Cromelin v. Markwalter*, 181 F.2d 948 (C.A. 5) (fourteen months); *Bowles v. J. J. Schmitt*, 170 F.2d 617 (C.A. 2) (over two years); *Jurin v. Wiltshire Parkway, Inc.*, 238 F.2d 263 (C.A.D.C.) (sixteen months); *Morse-Starrett Products Co. v. Steccone*, 205 F.2d 244 (C.A. 9) (twenty-two months).

V. Rule 60(b) was not designed to relieve a party from a free and deliberate decision made by his attorney in the course of litigation.

Even if petitioner's motion for correction and relief were otherwise meritorious, had been timely made, and had been permitted under the mandate of the Court of Appeals, the record clearly shows that the late Mr. Elton Watkins, petitioner's former counsel, decided at pretrial to rely solely upon the Federal Employers' Liability Act. He made an election to abandon the inconsistent theory that petitioner, as an employee of Morrison-Knudsen, Inc. had a remedy against respondent under the third-party claim provisions of the Washington workmen's compensation law. The latter claim, which was set up in the first draft of pretrial order (No. 15544, Tr. 39), was eliminated from the final pretrial order, which was limited to petitioner's cause of action under the Federal Employers' Liability Act. Under both Rule 16 governing pretrials and Rule 60(b), the pretrial order was and is binding upon petitioner, since the primary objective of pretrial procedure is to limit the issues to be tried, and to define exactly the theories of recovery and defense. (*Fowler v. Crown Zellerbach Corp.*, 163 F.2d 773 (C.A. 9), and see discussion by Judge Fee in *Clark v. United States*, 13 F.R.D. 342, 345 (D.C. Or.).) As Judge Fee stated in *Montgomery Ward & Co. v. Northern Pacific Terminal Co.*, 17 F.R.D. 52, 55 (D.C. Or.): "The pretrial order must after trial be binding upon all parties, as a judicial necessity." Similarly, it has been consistently held that theories not raised and presented in the pretrial order are waived (*Frank v. Giesy*, 117 F.2d 122, 126-127 (C.A. 9), and see 22 A.L.R.

(2d) 599, et seq., *Binding Effect of Court's Order Entered After Pretrial Conference.*")

At the risk of unduly lengthening this brief, some of the considerations which undoubtedly were in Mr. Watkins' mind at the time of pretrial and which influenced his decision to stake petitioner's case solely on the F.E.L.A. liability will be briefly reviewed. In the first place, the advantages of being under the F.E.L.A. were obvious: (1) assumption of risk would be no defense; (2) contributory negligence would not bar recovery but only diminish damages, and, if a violation of the Safety Appliance Acts contributed to the injury, then contributory negligence would not be a defense at all; (3) petitioner would have the benefit of the recent decisions of this Court interpreting the F.E.L.A.

However, it may not have been so much the advantages of F.E.L.A. coverage as the obstacles to recovery in a "third-party" action which prompted Mr. Watkins to rely exclusively on a claim under the F.E.L.A.

First of all, in a third-party action against respondent on the theory that petitioner was an employee of Morrison-Knudsen, Inc., contributory negligence and assumption of risk could have been asserted as complete defenses.

More important was the statute of limitations problem. This action had been filed just barely within the three-year limitation period of the F.E.L.A., but beyond the Oregon two-year statute governing an action for an injury to the person or rights of another, not arising on contract (ORS 12.110(1)).

However, there was another more serious obstacle to recovery on the theory that petitioner was employed by Morrison-Knudsen, Inc., at the time of the accident. It was admitted in the pretrial order (No. 13492, Tr. 6) that following the accident the Department of Labor and Industries of the State of Washington had paid to plaintiff, or for his account, a total of $8,690.71 in accordance with the payment schedules of the Washington Workmen's Compensation Act. Thus, any common-law cause of action against a third party which petitioner might have had was thereby assigned to the State of Washington pursuant to § 51.24.010, Revised Code of Washington (*Anderson v. Bauer*, 146 Wn. 594, 264 P. 410 (Sup. Ct. Wn.); *Arthur v. City of Seattle*, 137 Wn. 228, 242 P. 16 (Sup. Ct. Wn.); *State v. Starr*, 185 Wn. 18, 52 P.2d 897 (Sup. Ct. Wn.); *Kidder v. Marysville & A. Ry. Co.*, 160 Wn. 471, 300 P. 170 (Sup. Ct. Wn.)).

Thus, with the additional obstacles to recovery as a nonemployee of (1) common-law defenses, (2) the two-year Oregon statute of limitations, (3) assignment by operation of law of any cause of action to the State of Washington, it is easy to understand why Mr. Watkins decided to abandon the nonemployee theory and why he elected to concentrate solely upon the F.E.L.A. theory.

This litigation ended nearly four years ago when this court denied the previous petition for a writ of certiorari. Petitioner has shown no reason whatsoever why the finality of that judgment should be overthrown.

Thus, this case is analogous to *Ackermann v. United States*, 340 U.S. 193, 71 S. Ct. 209, 95 L. Ed. 207. There it was held that plaintiff could not invoke Rule 60(b)(6) to set aside a judgment canceling his certificate of naturalization where he could have filed a timely appeal from the judgment, but took the erroneous advice of a government official and decided not to appeal. Mr. Justice Minton wrote in part (340 U.S. at p. 198):

> "Petitioner made a considered choice not to appeal, apparently because he did not feel that an appeal would prove to be worth what he thought was a required sacrifice of his home. His choice was a risk, but calculated and deliberate and such as follows a free choice. Petitioner cannot be relieved of such a choice because hindsight seems to indicate to him that his decision not to appeal was probably wrong, considering the outcome of the Keilbar case. There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from."

In any event, even if the district court had jurisdiction to consider petitioner's motion under Rule 60, the order appealed from was made in the exercise of the trial court's sound discretion. The Court of Appeals did not find any abuse of discretion. In fact, as that court recently noted in *Atchison, Topeka and Santa Fe Railway Co. v. Barrett*, 246 F.2d 846, 850, there is no case in the Ninth Circuit where a trial court's denial of a motion to set aside a judgment pursuant to Rule 60(b) has been reversed for an abuse of discretion. Judge Barnes there stated (p. 849):

> "Discretion is peculiarly and properly left in the trial court in matters of this kind."

CONCLUSION

We cannot conclude without commenting upon the improper attempt by petitioner's attorney to convey the false impression to the court that petitioner is without remedy and has only received "a small preliminary initial allowance" from the Department of Labor and Industries of the State of Washington, which he had been called upon to refund (Pet. pp. 22-23).

It was stipulated in the May 1952 pretrial order that payments of $8,690.70 had been made to petitioner and for payment of hospital and doctor bills (No. 13492, Tr. 6). There is, of course, nothing in the record to show what further payments have been made to petitioner in the intervening period of over six years.

The decision of the court of appeals on the previous appeal, and the denial by this Court of the petition for certiorari, determined once and for all that petitioner was an employee of Morrison-Knudsen, Inc., rather than an employee of respondent. The record shows that the Department of Labor and Industries had taken the position that if petitioner could prove he was respondent's employee and if he made a recovery on that theory, then he would have to refund the benefits he had received under workmen's compensation (No. 13492, Tr. 89). Quite naturally, the State of Washington backed up this position as amicus curiae in a brief and oral argument before the Court of Appeals. However, its contention was rejected (207 F.2d 843), and ever since the denial of the previous petition for certiorari, the State

of Washington has not even had a colorable claim against petitioner to recover back compensation payments. In fact, since that date petitioner has been certain of collecting whatever additional compensation benefits were allowable under the Washington statutes.

Finally, we wish to refute the repeated assertions in the petition that this was a case of absolute liability under the Safety Appliance Acts.

While the equipment in question which respondent permitted to be operated on its lines by Morrison-Knudsen, Inc., may have been in violation of several provisions of the Safety Appliance Act, still there were many other issues to be tried in a third-party suit brought by petitioner under the Washington Workmen's Compensation Act. These included the factual issues of proximate cause, contributory negligence and assumption of risk, and the legal defenses of the statute of limitations, and assignment of petitioner's third-party claim to the State of Washington by operation of law.

Respondent's case on these factual issues of proximate cause, contributory negligence and assumption of risk would depend upon the testimony of a group of petitioner's fellow workers who were at the scene of the accident on January 30, 1946. The witnesses were employed by Morrison-Knudsen, Inc., and were not under respondent's control. The difficulties which respondent would now encounter in attempting to obtain their testimony is obvious. For petitioner's counsel to argue that respondent " * * * would suffer no conceivable prejudice because the matter has not be-

presented at an earlier date" (Pet. p. 18) is most unrealistic, to say the least.

In essence, petitioner's position is that he has a new attorney who believes that the prior litigation should have been conducted differently, and wants this Court to set aside a binding pretrial order made over six years ago. Both the trial court and the Court of Appeals have held his belated application for relief to be lacking in merit.

There is no substantial question presented as to the proper interpretation of Rule 60 of the Federal Rules of Civil Procedure. Nor is there any conflict between the decisions of the lower courts and decisions of this Court or other courts of appeal.

The petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 400

LEWIS C. DOUGALL,

Petitioner,

v.

SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY, a corporation,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Respondent's brief is replete with inaccuracies. Petitioner is compelled to reply.

To support its contention that Elton Watkins, one of petitioner's counsel, who died two years ago, suddenly discarded SAA on the eve of the initial hearing (despite its inconsistency with everything prior and subsequent), respondent charges:

1. The motion for trial of the segregated untried issue of Safety Appliance Act was a recent contrivance of petitioner's "new attorney who believes that a prior

litigation should have been conducted differently," that Mr. Watkins made a deliberate choice to abandon SAA and present counsel disagrees with his tactics. Nothing could be further from the facts. Respondent is well aware of the following:

a. Mr. Watkins joined with present counsel in an independent action in the District Court (No. 8635) asking the segregated issue of SAA be tried. The District Judge held the correct procedure was to revive the present action since the right to recover under SAA as a non-employee "was not adjudicated in said cause, but, on the contrary reserved." (Memo Nov. 1, 1956.)

b. Afterwards Mr. Watkins joined with present counsel in preparing the motion which is the subject matter of this petition. He even called respondent's counsel and discussed some of the issues at length. Only his untimely death prevented his personal appearance. He also assisted in the preparation of the motion asking the Court of Appeals clarify its mandate.

c. He insisted throughout his life he did not have the slightest intention of waiving SAA (No. 15544, Tr. 28). Within a few hours of his death, at 75, he reiterated this was the clearest case of injustice he had encountered.

2. Any doubts about this should be dispelled by the record. This complaint is framed under both SAA and FELA (No. 15544, Tr. 1); his tendered pre-trial order enumerated six violations of SAA, six times under

issues of fact, and six times under issues of law (No. 15544, Tr. 31-40); his formal objection to any segregation of the two issues was noted even in the pre-trial order tendered by respondent's counsel (No. 13492, Tr. 12); after respondent's counsel persuaded the Court to separate the two issues for separate determination, Watkins' first statement at the FELA hearing was that he was there only to discuss the first proposition, FELA (No. 13492, Tr. 38-9); the only evidence received related to FELA (No. 13492, Tr. 17, 18, 23, 24); his trial brief stated specifically it was limited to the "first legal proposition," FELA; even findings of fact prepared by respondent noted that FELA had been "segregated for separate trial" (No. 13492, Tr. 17-18). While it is true the same findings state the parties "had stipulated that this action was brought solely under FELA" (No. 13492, Tr. 23-24), this merely meant the segregated hearing was limited to FELA. There was never any intention of abandoning SAA. This is manifest by virtue of the fact that the day *before* these findings were signed Watkins filed formal objections to any conclusion that the case came within the exclusive provisions of FELA (No. 13492, Tr. 26). In his brief in the Court of Appeals, he flatly stated that appellant's rights were to be determined in accordance with the "FELA and the Federal Safety Appliance Act" (No. 13492, Br. 58). In the same brief he set forth admitted violations of SAA on 26 occasions (No. 13492, Br. 3, 4, 8, 45, 46, 47, 48, 50, 57, 58, 62, 63). His subsequent action in asking the judgment be corrected, filing an independent action, and assisting present counsel in preparing motion for

correction of mandate all demonstrate his consistent intention to assert two basis, SAA and FELA.

From a purely logical standpoint, why would venerable counsel for petitioner suddenly throw away a separate independent groups for recovery, particularly when he was so careful to interject it at every stage? The fact is Mr. Watkins looked forward eagerly to presenting this matter and felt keenly disappointed by this colossal run-around.

3. Respondent's counsel also argues it should make no difference that petitioner has been denied his federal rights because "payments of $8,690.70 had been made to petitioner and for payment of hospital and doctor bills" (Br. 7) under state workmen's compensation. And they intimate that large payments may also have been made in the intervening six years (Br. 17). This is a very shocking statement! The parties long ago stipulated that instead of receiving $8,690.70 plus hospital and doctor bills, the payments totaled $8,690.70 of which "$4,826.70 was for hospitalization and doctor" (No. 13492, Tr. 6). Petitioner received only $3,864. And even this he must restore. This action was instituted simply because the Washington Department of Labor and Industries cut off his payments and ordered him to repay all moneys received. The Attorney General wrote:

> "It is our opinion that the Department misinterpreted the statute when it allowed Mr. Dougall's claim; that his right should have been limited to recovery under the Federal Employers' Liability Act and that expenditures made by the Department in the amount of $8,690.70 should be refunded." (No. 15544, Tr. 13-14)

Furthermore, respondent's innuendoes that Dougall has probably received considerable sums since that time is completely outside the record and is untrue. Dougall has received a few hundred dollars which he is under a continuing duty to restore.

In any event can it be an adequate excuse for a denial of Federal rights that an individual has been partially and inadequately (and in this case erroneously) compensated from another source?

4. Respondent asserts petitioner should be precluded because 33 months elapsed between the entry of judgment and filing of this motion (Br. 7). This only presents half the picture. Seven months earlier, an independent action was filed in the same court (No. 8635) asking that the separate and untried issue of SAA be heard. This independent action was dismissed 6 months later by District Judge East who stated plaintiff should revive the case at bar because SAA had not been "adjudicated in said cause but, on the contrary reserved." (Memo. No. 1, 1956).

Mr. Watkins assumed the untried issue would be set for trial without filing additional pleadings because the issue had been specifically "reserved" for later determination. The District Court, in making its findings, noted:

"The FELA was segregated for separate trial by the Court," the parties had offered certain evidence and had "rested on this issue," and it had "considered all matters of fact and law presented by the parties on trial and in their arguments and brief touching the